No. 84-261

In the Supreme Court of the United States

OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION, PETITIONER

v.

GARY WEINTRAUB, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the trustee of a corporation in bankruptcy has the power to assert or waive the debtor corporation's attorney-client privilege with respect to communications that took place before the petition in bankruptcy was filed.

PARTIES TO THE PROCEEDING

Petitioner, the Commodity Futures Trading Commission, applied to enforce an administrative subpoena in the district court and was the appellee in the court of appeals.

Respondent Gary Weintraub, a respondent in the district court, did not appeal from the district court's order.

Respondents Frank H. McGhee and Andrew McGhee intervened as respondents in the district court and were appellants in the court of appeals.

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The Solicitor General, on behalf of the Commodity Futures Trading Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The original opinion of the court of appeals (App., *infra*, 1a-11a) is unreported. An order of the court of appeals modifying that opinion (App., *infra*, 12a-16a) is also unreported. The opinion of the court of appeals as modified is reported at 722 F.2d 338.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1983 (App., *infra*, 23a-24a). A timely petition for rehearing was denied on April 18, 1984 (App., *infra*, 21a-22a). On July 10, 1984, Justice Stevens extended the time within which to file a petition for a writ of certiorari to August 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Bankruptcy Reform Act of 1978, 11 U.S.C. 101 *et seq.*, are reprinted at App., *infra*, 25a-36a.

STATEMENT

1. This case arises out of a formal investigation by the Commodity Futures Trading Commission (CFTC) to determine whether Chicago Discount Commodity Brokers (CDCB) or persons associated with that firm violated the antifraud or other provisions of the Commodity Exchange Act (Act), 7 U.S.C. 1 *et seq.* CDCB was a discount commodity brokerage house registered with the CFTC as a futures commission merchant pursuant to 7 U.S.C. 6d(1). On October 27, 1980, the Commission filed a complaint against CDCB in the United States District Court for the Northern District of Illinois, alleging violations of the Act. The same day, the parties entered into a consent decree providing, inter alia, for a freeze on CDCB's assets and the appointment of a receiver. App., *infra*, 2a.

CDCB's sole director and officer at this time was its president, respondent Frank H. McGhee. Respondent Andrew McGhee had resigned his positions as officer and director on October 21, 1980. Larry Cote, CDCB's secretary and vice president, had resigned the following day. App., *infra*, 14a.

On November 4, 1980, the receiver, John K. Notz, Jr., filed a voluntary petition in bankruptcy on CDCB's behalf, seeking liquidation under Subchapter IV of Chapter 7 of the Bankruptcy Reform Act of 1978 (Bankruptcy Code), 11 U.S.C. 761 *et seq.* Notz was appointed interim trustee pursuant to Section 15701 of the Bankruptcy Code and was later made the permanent trustee pursuant to Section 702. App., *infra*, 2a. Upon filing of the bankruptcy petition, the CFTC commenced

its formal investigation pursuant to 7 U.S.C. 12(a) and 15.

On January 28, 1981, the Commission served an investigatory subpoena upon CDCB's former counsel, respondent Gary Weintraub, seeking his testimony regarding, inter alia, suspected fraudulent activities and misappropriation of customer funds by CDCB's officers and employees. Weintraub appeared for his deposition and responded to certain inquiries, but refused to answer 23 questions on the basis of CDCB's attorney-client privilege. App., *infra*, 2a-3a.

2. The Commission filed this subpoena enforcement action pursuant to 7 U.S.C. 15 on December 15, 1981 in the United States District Court for the Northern District of Illinois to compel Weintraub to answer the questions as to which he had asserted CDCB's privilege. After determining that waiver of the privilege would be in the best interests of CDCB's estate in light of potential claims by the estate against CDCB's former management and others,[1] the trustee in bankruptcy, on March 11, 1982, waived the corporation's attorney-client privilege with respect to any communications that occurred on or before October 27, 1980. App., *infra*, 3a. On April 26, 1982, a United States magistrate granted the Commission's application for an order compelling Weintraub to answer, on the ground that the trustee had validly waived CDCB's privilege (*id.* at 19a-20a). The district court upheld the magistrate's order on June 9, 1982 (*id.* at 18a). Frank and Andrew McGhee were granted leave to intervene on June 30, 1982 (*id.* at 3a), and argued (in a request for reconsideration) that the trustee's waiver was ineffective over their objection. On July 27, 1982, the district court

[1] See Brief of John K. Notz, Jr., Trustee, as Amicus Curiae 1. The trustee noted substantial actual or potential claims by the estate against respondents totalling more than $4 million (*id.* at 8).

clarified its earlier order to provide that Weintraub must respond without asserting CDCB's attorney-client privilege[2] (*id.* at 17a). The McGhees appealed from the July 27 order.[3]

3. The court of appeals reversed (App., *infra*, 1a-16a).[4] The Court concluded that a bankruptcy trustee does not have the power to waive a corporate debtor's attorney-client privilege with respect to communications that occurred before the filing of the bankruptcy petition (*id.* at 11a). Although it took note of the broad powers accorded a trustee under the Bankruptcy Code, the court concluded that those powers do not include the power to waive or assert the corporate debtor's attorney-client privilege for four reasons: the trustee does not under the Code "replace the corporation * * * [or] succeed to the positions of [its] officers and directors" (*id.* at 9a); waiver by the trustee of a corporate debtor would treat such debtors less favorably than individuals in bankruptcy (*id.* at 9a-10a); waiver by the trustee would discriminate against bankrupt corporations as compared to solvent corporations (*id.* at 10a); and, "most importantly," waiver by the

[2] The earlier order had not explicitly limited the attorney-client privilege in question to that asserted on behalf of the corporation (App., *infra*, 18a).

[3] Because the district court refused to compel Weintraub to testify pending appeal (App., *infra*, 4a n.4), the Commission has not yet obtained answers to the questions at issue. While administrative proceedings have already been initiated against respondents, Weintraub's answers could provide information for additional causes of action, or claims against other persons.

[4] On its own motion, the panel revised its opinion on March 19, 1984 (App., *infra*, 12a-16a), but reached the same result as it had earlier (*id.* at 1a-11a). The CFTC's petition for rehearing was denied without opinion (*id.* at 21a-22a). The petition had been supported by several amici: the Securities and Exchange Commission, the United States Trustee for the Northern District of Illinois, and the trustee for CDCB.

trustee could chill attorney-client communications (*id.* at 10a-11a).

The court of appeals recognized that its decision conflicts with *Citibank, N.A.* v. *Andros*, 666 F.2d 1192 (8th Cir. 1981), which held that the trustee of a corporation undergoing liquidation pursuant to the former Bankruptcy Act, 11 U.S.C. (1976 ed.) 110(a), could waive the debtor's attorney-client privilege, but declined to follow it (App., *infra*, 15a-16a). The court also noted that *In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383 (2d Cir. 1982), held that the trustee of a corporation undergoing reorganization pursuant to Chapter 11 of the Bankruptcy Code could waive the corporation's attorney-client privilege, but distinguished it on the ground that the board of directors of the corporation there was no longer in existence, while here, Frank McGhee remained an officer and director (App., *infra*, 14a-15a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals conflicts with the decisions of two other circuits. It is based on a fundamental misunderstanding of the role of a trustee in bankruptcy and the power of corporate management to waive the attorney-client privilege, and will seriously impede the government's ability to investigate violations of federal regulatory and criminal statutes. Review by this Court is clearly warranted.

1.a. The decision below directly conflicts with the decision of the Eighth Circuit in *Citibank, N.A.* v. *Andros, supra*.[5] In *Citibank*, the court held that the

[5] The decision below also conflicts with a recent decision of the Ninth Circuit, *In re Boileau*, No. 83-6259 (June 27, 1984), petition for reh'g pending (filed July 13, 1984), and with the decisions of virtually every other court to have considered the question. In *Boileau*, the court held that an examiner in a reorganization proceeding who had been granted most of the powers of a trustee had the power to waive the debtor's attorney-client privilege. In reaching this conclusion, the court relied on prece-

trustee in bankruptcy of a corporation undergoing liquidation under the former Bankruptcy Act[6] may waive the debtor corporation's attorney-client privilege over the objection of its officers (666 F.2d at 1193 & n.3).

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dents such as *Citibank*, holding that a trustee has the power to waive a debtor's attorney-client privilege, and noted without comment that the decision below conflicts with these authorities (slip op. 2743). See also *Fulk* v. *Bagley*, No. C-78-333-WS (M.D.N.C. Dec. 21, 1983), reconsideration denied (Jan. 3, 1984) (Chapter X reorganization under former Bankruptcy Act); *In re Continental Mortgage Investors*, No. 76-593-S (D. Mass. July 31, 1979) (Chapter X reorganization); *In re Investment Bankers, Inc.*, 30 Bankr. 883, 886 (Bankr. D. Colo. 1983) (liquidation under Securities Investor Protection Act); *In re Nat'l Trade Corp.*, 28 Bankr. 872, 874 (Bankr. N.D. Ill. 1983) (reorganization); *In re Featherworks Corp.*, 25 Bankr. 634, 643 (Bankr. E.D.N.Y. 1982), aff'd, 36 Bankr. 460 (E.D.N.Y. 1984); *In re Smith*, 24 Bankr. 3 (Bankr. S.D. Fla. 1982); *In re Silvio De Lindegg Ocean Developments, Inc.*, 27 Bankr. 28 (Bankr. S.D. Fla. 1982) (liquidation); *In re Kaleidoscope, Inc.*, 15 Bankr. 232, 239-240 (Bankr. N.D. Ga. 1981), rev'd on other grounds, 25 Bankr. 729 (N.D. Ga. 1982) (Chapter X reorganization); *In re Amjoe, Inc.*, 11 Collier Bankr. Cas. 2d (MB) 45 (Bankr. M.D. Fla. 1976); *Weck* v. *District Court*, 161 Colo. 384, 422 P.2d 46 (1967) (statutory accountant-client privilege); S. Stone & R. Liebman, *Testimonial Privileges* § 1.19, at 35 & n.152 (1983) ("authorities are in accord that successors or trustees of bankrupt or dissolved corporations may assert or waive the privilege"). But see *Ross* v. *Popper*, 9 Bankr. 485 (S.D.N.Y. 1980) (Magis.).

[6] The debtor corporations in *Citibank* were liquidated under the former Bankruptcy Act, 11 U.S.C. (1976 ed.) 1 *et seq.* See *In re Hy-Gain Electronics Corp.*, 11 Bankr. 119, 120 (D. Neb. 1978), rev'd, *Citibank, N.A.* v. *Andros*, *supra*. Section 70(a) of the former Act, 11 U.S.C. (1976 ed.) 110(a), relied on by the court of appeals in *Citibank* (666 F.2d at 1193 n.3), does not, for purposes of the instant case, differ from Section 541(a) of the current Bankruptcy Code as it applies to liquidation under Chapter 7. See 4 *Collier on Bankruptcy* ¶ 541.02[2], at 541-14 (15th ed. 1984); *In re Silvio De Lindegg Ocean Developments, Inc.*, *supra* (following *Citibank* in Chapter 7 proceeding). Cf. *In re Investment Bankers, Inc.*, *supra* (following *Citibank* in liquidation proceeding under Securities Investor Protection Act).

The Eighth Circuit reasoned correctly that the power to assert or waive a corporation's attorney-client privilege rests with the corporation's management and that the bankruptcy trustee in a liquidation proceeding is vested with the authority to manage the debtor corporation (*id.* at 1195). Accordingly, the power to waive or assert the corporate debtor's attorney-client privilege is transferred to the trustee along with the other powers of management *(ibid.)*. The court below recognized the conflict with *Citibank*, but declined to follow it, based on its own interpretation of the Bankruptcy Code and the policies behind it and the attorney-client privilege (App., *infra*, 15a-16a).

b. The decision below also conflicts with the result in *In re O.P.M. Leasing Services, Inc.*, *supra*. In *O.P.M. Leasing*, the Second Circuit held that the trustee of a corporation undergoing reorganization pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.*, could waive the corporation's attorney-client privilege over the objection of two of the corporation's former officers and directors, one of whom was its parent company's sole voting shareholder. While the court in *O.P.M. Leasing* stressed the fact that the debtor's board of directors was no longer in existence (670 F.2d at 386-387), the decision should not be distinguished on that basis. Whether or not pre-bankruptcy officers and directors formally retain their positions after a trustee is appointed, they thereafter lack the power to manage the corporation (see pages 9-11, *infra*). Accordingly, Frank McGhee, while technically still an officer and director of CDCB, possessed no greater authority in any relevant respect over the debtor than did the former officers and directors in *O.P.M. Leasing*. More generally, the *O.P.M. Leasing* court recognized that the management of a corporation is the proper entity to assert or waive its attorney-client privilege (670 F.2d at 387). When a trustee is appointed under Chapter 11, he

is granted broad management powers equivalent in relevant respects to a Chapter 7 trustee (see pages 10-11 & note 12, *infra*). It follows that the trustee has the power to waive the privilege in either case.

2. The court of appeals' decision rests on a misunderstanding of the law of corporations and bankruptcy.

a. The question raised by this case is who is the proper party to act for a corporation in asserting or waiving its attorney-client privilege when it is undergoing liquidation pursuant to Chapter 7 of the Bankruptcy Code. A corporation, as an artificial entity, must of course act through natural persons. The power to assert or waive the corporation's attorney-client privilege rests with its management—normally the board of directors—or those authorized by management to assert this power.[7] See, *e.g.*, *Citibank*, 666 F.2d at 1195; *Stewart Equipment Co.* v. *Gallo*, 32 N.J. Super. 15, 107 A.2d 527 (1954); Note, *The Lawyer-Client Privilege: Its Application to Corporations, the Rule of Ethics, and Its Possible Curtailment*, 56 Nw. U.L. Rev. 235, 243-244 (1961); see also *United States* v. *DeLillo*, 448 F. Supp. 840 (E.D.N.Y. 1978) (board of trustees of pension fund is proper entity to waive privilege, by analogy to corporations); cf. *Garner* v. *Wolfinbarger*, 430 F.2d 1093, 1103-1104 (5th Cir., 1970), cert. denied, 401 U.S. 974 (1971) (in derivative action, shareholders may for good cause overcome corporation's privilege). The corporation's privilege may not be asserted by individual directors or officers in their own right; indeed, the corporation may waive its privilege with respect to

[7] In practice, a large corporation is typically managed by its top officers, but their authority legally derives from that of the board of directors. See Eisenberg, *Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants*, 63 Calif. L. Rev. 375 (1975). The distinctions generally drawn between officers and directors are not relevant to the issue raised by this petition.

communications made by a director or officer to the corporation's attorney. *E.g.*, *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596, 611 n.5 (8th Cir. 1978) (en banc); *United States* v. *Piccini*, 412 F.2d 591, 593 (2d Cir., 1969); *In re Grand Jury Proceedings*, 434 F. Supp. 648 (E.D. Mich. 1977), aff'd per curiam, 570 F.2d 562 (6th Cir. 1978); *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975); Note, *The Attorney-Client Privilege: A Look at its Effect on the Corporate Client and the Corporate Executive*, 55 Ind. L.J. 407, 411 (1980).

The question in this case thus requires a determination of who, for purposes of assertion or waiver of the corporation's privilege, constitutes the "management" of a corporate debtor undergoing Chapter 7 liquidation. The issue is not, as the court below suggested (App., *infra*, 9a), whether the trustee technically "replace[s] the corporation as an entity" or "succeed[s] to the positions of [its] officers and directors." The answer must be found in the powers accorded a Chapter 7 trustee by the Bankruptcy Code and in the policies behind the attorney-client privilege as it applies in the corporate context.[8]

b. A debtor undergoing liquidation is required to "surrender to the trustee all property of the estate and any recorded information * * * relating to property of the estate"[9] (11 U.S.C. 521(3)). The trustee is "accountable for all property received" (11 U.S.C. 704(2)), and

[8] The legislative history of the Bankruptcy Code indicates that Congress left this issue to be determined by the courts. See 124 Cong. Rec. 32400 (1978) (remarks of Rep. Edwards); *id.* at 33999 (1978) (remarks of Sen. DeConcini).

[9] The estate is comprised in part of "all legal or equitable interests of the debtor in property [with certain enumerated exceptions,] as of the commencement of the case" (11 U.S.C. 541(a)(1)). It includes causes of action against officers and directors for misconduct and mismanagement. See 4 *Collier on Bankruptcy* ¶ 541.10[8], at 541-67 (15th ed. 1984).

is the legal representative of the estate, with the capacity to sue and be sued (11 U.S.C. 323). He is directed to reduce the property of the estate to money and "close up [the] estate as expeditiously as is compatible with the best interests of parties in interest" (11 U.S.C. 704(1)). He must "investigate the financial affairs of the debtor" (11 U.S.C. 704(3)), and is empowered to sue officers, directors and other insiders to recover fraudulent or preferential transfers of the debtor's property (11 U.S.C. 547(b)(4)(B), 548). If continued operation of the debtor's business for a limited time is desirable, the court "may authorize the trustee to operate the business" (11 U.S.C. 721). When a commodity broker is liquidated, the trustee is required to comply with certain instructions of customers, to answer certain margin calls, and to prevent commodity contracts from remaining open (11 U.S.C. 765, 766(a) and (b)). He may also "operate the business of the debtor" in order to close certain commodity contracts (11 U.S.C. 766(b)).

It is clear from the foregoing that a liquidation trustee is granted in all relevant respects complete management authority over the debtor.[10] See 2 *Collier on Bankruptcy* ¶ 323.01, at 323-2 (15th ed. 1984). Former management's role is limited to turning over the corporation's property to the trustee and to providing certain information to the trustee and creditors (11 U.S.C. 521, 343). In liquidation cases, and in reorganization cases where a trustee has been appointed[11] (see 11 U.S.C. 1107, 1108), former management is not authorized to continue operating the corporation's business.[12]

Because the liquidation trustee is granted, in essence, complete management authority, he is the proper party to waive or assert the corporate debtor's attorney-client privilege.[13] See generally Proposed Fed. R. Evid. 503(c), 56 F.R.D. 183, 236 (1972); *In re Grand Jury Proceedings*, 434 F. Supp. at 649, 650 n.1. Officers and directors of a debtor undergoing liquidation have been deprived of the authority to manage; there is no reason why they should be deemed to continue to possess the authority to act for the corporation with respect to its privilege. If such officers and directors object to a waiver of the privilege, it is solely as individuals; such objections are ineffective even with respect to their own communications (see pages 8-9, *supra*).

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[10] The court of appeals' failure to recognize this may be attributable to its confusion of various provisions of the Bankruptcy Code. The court relied almost exclusively on 15A W. Fletcher, *Private Corporations* § 7657 (rev. ed. 1981) in concluding that a corporation "is capable of numerous functions even after the filing of the petition in bankruptcy" (App., *infra*, 9a). The cited section of Fletcher's treatise, however, does not pertain to liquidation proceedings under present law, at least with respect to who has the power to act on behalf of the bankrupt entity.

[11] Under Chapter 11, a trustee may only be appointed for cause, such as "fraud, dishonesty, incompetence or gross mismanagement * * * by current management," or if such appointment is in the best interests of the estate and its beneficiaries (11 U.S.C. 1104(a)(1)). Under Chapter 7, by contrast, appointment or election of a trustee is automatic (11 U.S.C. 701, 702).

[12] While it is not necessary to reach the issue in order to decide this case, we note that when a trustee is appointed under Chapter 11, he should have the power to waive or assert the debtor corporation's attorney-client privilege for reasons analogous to those under Chapter 7. See generally 11 U.S.C. 323, 1106, 1108; 5 *Collier*, *supra*, *at* ¶ 1106.01.

[13] The trustee may also assert or waive the privilege because the power to do so is an intangible asset that passes to the trustee under the Bankruptcy Code (11 U.S.C. 521(3), 704). See *Citibank*, 666 F.2d at 1195; *O.P.M. Leasing*, 670 F.2d at 386 n.2; *In re Amjoe*, 11 Collier Bankr. Cas. 2d (MB) 45 (M.D. Fla. 1976). Cf. *Ex parte Fuller*, 262 U.S. 91 (1923) (trustee has the authority to disclose the books of a bankrupt partnership over the partners' claims of privilege).

c. This result serves the important policy of preventing former officers and directors from abusing the corporation's privilege in order to shield their own wrongdoing and prevent the effective assertion of valid claims by those injured by their actions. Decisions with respect to the privilege properly lie with the trustee, a fiduciary independent of prior management,[14] accountable for all property of the estate (11 U.S.C. 704(2)), and under a duty to the debtor and the creditors to realize as much as possible from the estate (4 *Collier*, *supra*, ¶ 704.,01[3], at 704-5). It is especially important for the trustee to investigate the conduct of prior management and to uncover and assert causes of action against the debtor's officers and directors (4 *Collier*, *supra*, ¶ 704.07, at 704-17—704-18). See generally 11 U.S.C. 704(3), 547, 548. Fulfillment of this duty would often be impossible if former management were allowed control over the corporation's attorney-client privilege.[15] See generally *In re Browy*, 527 F.2d 799, 802 (7th Cir. 1976).

In this very case, respondent Frank McGhee was convicted in 1983 of embezzling $3.5 million in CDCB's customer funds, in violation of Section 9(a) of the Commodity Exchange Act, 7 U.S.C. 13(a), and was sentenced to three years' incarceration. *United States* v.

[14] Directors and officers are "insiders" who may not vote in the election of the trustee (11 U.S.C. 101(25)(B)(i) and (ii), 702(a)(3)).

[15] The court of appeals' decision would presumably apply not only to investigations by government agencies, but also to the trustee's own examination of the debtor corporation's counsel. See generally, *e.g.*, 11 U.S.C. 542(e) (disclosure of recorded information to trustee is "[s]ubject to any applicable privilege"); *In re O.P.M. Leasing Services, Inc.*, *supra*; *In re Silvio De Lindegg Ocean Developments, Inc.*, *supra*. See also Brief of John K. Notz, Jr., Trustee, as Amicus Curiae 3-4 (examination of Weintraub was undertaken by trustee as well as by the CFTC).

Frank McGhee, No. 83 CR 262-1 (N.D. Ill. Oct. 7, 1983). Where, as here, the corporation may have causes of action against its officers and directors for fraud or other wrongful conduct, those individuals clearly have a conflict of interest with respect to whether the corporation's attorney-client privilege should be exercised. Cf. *Pepper* v. *Litton*, 308 U.S. 295, 306 (1939). Allowing the very insiders who may have defrauded the corporation to veto the trustee's waiver of the privilege would poorly serve the interests of the debtor and its beneficiaries, and would defeat the privilege's purpose of "promot[ing] broader public interests in the observance of law and administration of justice" (*Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)).[16] See generally *Valente* v. *Pepsico, Inc.*, 68 F.R.D. 361, 369-370 n.16 (D. Del. 1975); cf. *Garner* v. *Wolfinbarger*, *supra*.

On the other hand, the policy concerns expressed by the court of appeals (App., *infra*, 9a-11a) are misplaced.[17] The "potential chilling effect on attorney-client communications" (*id.* at 10a) is no greater here than in the case of a solvent corporation: individual officers and directors always run the risk that present or successor management may waive the corporation's privilege with respect to their communications with

[16] It should also be noted that special fiduciary obligations are owed by officers of commodity brokers. See *Gordon* v. *Shearson Hayden Stone, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,016, at 23,976 n.16 (1980), aff'd mem. *sub nom. Shearson Loeb Rhoades, Inc.* v. *CFTC*, 673 F.2d 1339 (9th Cir. 1982); *In re Rosenbaum Grain Corp.*, 103 F.2d 656, 661 (7th Cir. 1939).

[17] The court's concerns are especially unpersuasive because it failed to take into account that the attorney-client privilege, which inhibits the truth-seeking process, must be "strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 *Wigmore on Evidence* § 2291, at 554 (McNaughton rev. 1961). See, *e.g.*, *Trammel* v. *United States*, 445 U.S. 40, 50 (1980).

counsel (see pages 8-9, *supra*). The chilling effect, if any, arises in all such cases from the fact that the privilege is that of the corporation, not its officers or directors.[18] The court's statement (App., *infra*, 9a) that waiver by the trustee would "condone an inequality of treatment between bankrupt corporations and bankrupt individuals" is also unpersuasive. Corporations, as "artificial creature[s] of law" (*Upjohn Co.* v. *United States*, 449 U.S. 383, 389-390 (1981)), must act through natural persons to exercise their rights. It does not discriminate against a corporation to designate the trustee—who now constitutes the "management"—as the person to act on its behalf.[19] Finally, the court's concern (App., *infra*, 10a) over discrimination against bankrupt corporations as compared to solvent ones is groundless. The same rule applies to both: the privilege may be waived by management. Any difference in treatment results from the fact that the management of a corporation undergoing liquidation is placed in the hands of a trustee pursuant to the Bankruptcy Code.[20] Indeed, the court of appeals' decision could work to the disadvantage of corporations in bankruptcy by pre-

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[18] If counsel was also acting as an attorney for the individual officer or director, the individual may be able to assert his own attorney-client privilege. *E.g.*, *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d at 611 n.5.

[19] The court's statement (App., *infra*, 10a) that waiver by the trustee would allow the attorney-client privilege to "vanish" on the "whim" of the trustee is plainly incorrect. The trustee's waiver must be based on his judgment as to the best interests of the estate (see page 12, *supra*), not on a "whim." And waiver of the privilege by the trustee, acting for the debtor, no more causes the privilege to "vanish" than does any other proper waiver by the party authorized to make it.

[20] Of course the Bankruptcy Code is premised on the need to treat insolvent individuals and corporations differently from solvent ones. The Code provides debtors with certain important advantages, such as a stay of creditors' actions (11 U.S.C. 362).

venting them from discovering valid claims against officers and directors. See pages 12-13, *supra*.

3. The decision of the court of appeals will seriously impede the government's ability to enforce federal criminal, commodity, and securities laws by shielding vital information from investigators and administrative agencies and foreclosing an important avenue of voluntary cooperation between the government and bankruptcy trustees. It will, for example, substantially hinder the CFTC's ability to investigate and prosecute insiders of bankrupt commodity corporations. Because insiders' fraud frequently precipitates commodity firms' bankruptcies,[21] the Commission's effectiveness is especially important in this context.[22] See generally H.R. Rep. 95-595, 95th Cong., 1st Sess. 271 (1977) (Chapter 7 liquidation procedures for commodity brokers designed to give their customers "special protection"). The Securities and Exchange Commission (SEC) would similarly be adversely affected in its enforcement of

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[21] See, *e.g.*, *In re Group J. David, Inc.* and *In re J. David Dominelli*, No. 84-00633/634-P-INV-7 (Bankr. S.D. Cal. filed Feb. 13, 1984); *In re J. David Securities*, No. 84-01309-LM7 (Bankr. S.D. Cal. filed Mar. 22, 1984); *In re Financial Partners, Ltd.*, No. 82-B-14-353 (Bankr. N.D. Ill. filed Oct. 22, 1982); *In the Matter of T&D Management Co.*, Nos. 81-02568, 02569, 02570 (Bankr. D. Utah filed Aug. 10, 1981); *In re Incomco, Inc.*, No. 80 13 11217 (Bankr. S.D.N.Y. filed Aug. 1, 1980); *In re Auric Equities Corp.*, No. 80-13-10283 (Bankr. S.D.N.Y. filed Feb. 27, 1980); *In re Trending Cycles for Commodities, Inc.*, No. 80-00099-BKC-TCB (Bankr. S.D. Fla. filed Jan. 31, 1980).

[22] The trustee is required to furnish, on request, information concerning the estate and its administration (including facts ascertained with respect to fraud, misconduct and mismanagement) to any party in interest (11 U.S.C. 704(6)). The CFTC has the right to raise, appear and be heard on any issue in a commodity broker liquidation (11 U.S.C. 762), and qualifies as a party in interest. As such, the Commission has participated in the CDCB liquidation.

federal securities laws,[23] as would the government's use of grand juries to investigate persons associated with bankrupt corporations[24] and its prosecution of fraud relating to bankruptcy cases under 18 U.S.C. 152.

The voluntary cooperation of trustees with the government in the latter's investigations of prior management—including, where appropriate, waiver of the attorney-client privilege—is common because it is often in the interest of the estate to allow the government to undertake the burden and expense of such investigations, and then to file civil actions in their wake.[25] In and out of the bankruptcy context, voluntary cooperation by persons or corporations being investigated by the government is extremely important to the effective enforcement of the law.[26]

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[23] Insider misconduct often results in the bankruptcy of publicly held corporations when that conduct comes to light. See, *e.g.*, *In re Equity Funding Corp.*, 375 F. Supp. 1378, 1380-1381 (J.P.M.D.L. 1974); *In re Saxon Industries, Inc.*, 29 Bankr. 319 (Bankr. S.D.N.Y. 1983). In part because of the frequency of such occurrences, the SEC has the right to participate in reorganization proceedings under Chapter 11 (11 U.S.C. 1109(a)). See S. Rep. 2073, 75th Cong., 3d Sess. 6-10 (1938).

[24] During a grand jury investigation in the Southern District of Illinois, for example, counsel for a corporation undergoing Chapter 11 reorganization, at the behest of its former officers and contrary to the waiver of the trustee, relied on the decision below to invoke the attorney-client privilege on behalf of the corporation, thereby shielding the officers from potentially damaging revelations concerning possible securities fraud and other violations. *In re Grand Jury Proceedings*, No. 83-3337 (S.D. Ill.).

[25] Where such cooperation is not, in the trustee's judgment, in the best interests of the estate because of possible third-party claims against it, the trustee presumably would not waive the privilege.

[26] Indeed, voluntary cooperation by corporations with the SEC is so common that an entire body of law has developed with respect to whether a voluntary waiver of the attorney-client privilege in favor of the SEC also waives the privilege with respect to others who seek the same information. See, *e.g.*, *Permian Corp.* v. *United States*, 665 F.2d 1214 (D.C. Cir. 1981); *Diversified Industries, Inc.* v. *Meredith*, *supra*.

The decision below also undermines the ability of the United States Trustees and the private bankruptcy trustees they supervise to perform their statutory obligations.[27] Although corporate liquidations occur less frequently than Chapter 7 cases filed by individuals, corporate bankruptcies administered by United States Trustees usually involve significantly larger assets and liabilities; they have a disproportionate impact on the administration of the bankruptcy law because of their size, importance and complexity. Trustees in these cases are regularly confronted with inadequate or missing records coupled with allegations of fraud or preferential dealings by corporate officers. The waiver of the attorney-client privilege is of great practical concern because the attorney of a bankrupt corporation is often the best (and sometimes the only) repository of information about the corporation's prior affairs. If the trustee cannot obtain this information himself or authorize its disclosure to interested government agencies whose investigations coincide with the interests of the corporation and its creditors, he will be deprived of an important tool for the effective exercise of his responsibilities. See 11 U.S.C. 704(1) and (3).[28]

The principal application of the decision below will be to situations where prior management has, through ille-

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[27] United States Trustees serve in 18 judicial districts to supervise the administration of Chapter 7 cases and private trustees appointed in those cases (28 U.S.C. 586(a)(1) and (3)). When a private trustee is not available for appointment, the United States Trustee is authorized to act as trustee. 11 U.S.C. 15701(b).

[28] The Securities Investor Protection Corporation would also be adversely affected in its ability to protect the customers of stockbrokers that undergo bankruptcy proceedings. See 15 U.S.C. 78aaa *et seq*.

gal actions, injured the corporation and its creditors, shareholders, and customers. It grants officers and directors of insolvent corporations the power to foreclose effective investigation into their own misconduct, and will thereby frustrate the legitimate efforts of bankruptcy trustees and law enforcement authorities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1984

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82-2420

COMMODITY FUTURES TRADING COMMISSION,
PETITIONER-APPELLEE

v.

GARY WEINTRAUB, RESPONDENT, AND
FRANK H. MCGHEE AND ANDREW MCGHEE,
INTERVENING RESPONDENTS-APPELLANTS

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 C 6996—**Nicholas J. Bua,** *Judge*
and **Carl B. Sussman,** United States *Magistrate.*

ARGUED APRIL 8, 1983—DECIDED NOVEMBER 21, 1983

Before PELL and COFFEY, *Circuit Judges*, and WEIGEL, *District Judge.* *

WEIGEL, *District Judge.* Two individuals, both officers and shareholders in a bankrupt corporation, appeal from an order of the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to 28 U.S.C. § 1291. The district court, by minute order, affirmed a United States Magistrate's order that the trustee in bankruptcy of the bankrupt firm had the authority to waive the corporation's attorney-client

* The Honorable Stanley A. Weigel, Senior District Judge for the United States District Court for the Northern District of California, is sitting by designation.

privilege, as to "all communications or information ... occurring or arising on or before" the date the petition in bankruptcy was filed.[1] For the reasons set out below, we reverse.

I

Chicago Discount Commodity Brokers, Inc. ("CDCB") was a discount commodity brokerage house registered with the Community [sic] Futures Trading Commission (the "Commission") as a futures commission merchant. On October 27, 1980, the Commission filed a complaint against CDCB in the United States District Court for the Northern District of Illinois alleging violations of the Commodity Exchange Act, 7 U.S.C. § 6d(2) (Supp. III 1979). Also, on October 27, 1980, a consent decree was entered into, which provided, *inter alia*, for an immediate freeze on corporate assets, the appointment of a receiver, and that the Commission would be permitted to investigate CDCB's operations. The district court appointed John K. Notz ("Notz") of the Chicago law firm of Gardner, Carton & Douglas as equity receiver.

On November 4, 1980, Notz, as receiver, filed a voluntary petition in bankruptcy on behalf of CDCB. *In re Chicago Discount Commodity Brokers, Inc.*, No. 80 B 14472 (Bankr. N.D. Ill.). The petition sought relief under Subchapter IV of Chapter 7 of the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 761-766 (1979), which provides for liquidation of bankrupt commodity brokers. The bankruptcy court initially appointed Notz as First Interim Trustee and, later, Permanent Trustee of CDCB.

On January 28, 1981, the Commission served an administrative subpoena *duces tecum* upon respondent, Gary Weintraub ("Weintraub"), in connection with its

[1] *See Commodity Futures Trading Commission* v. *Weintraub*, No. 81-C-6996, *slip op.* at 2 (N.D. Ill. April 26, 1982).

investigation of CDCB. Weintraub formerly had represented CDCB as one of its attorneys. Weintraub appeared for deposition on February 26 and 27, 1981, and, on August 26, 1981, answering approximately 800 questions in all. However, he refused to answer 23 other questions, asserting the attorney-client privilege. On December 15, 1981, the Commission filed a motion to compel answers to those 23 questions. Nevertheless, on March 11, 1982, Notz, as trustee in bankruptcy, waived the attorney-client privilege on behalf of CDCB, as to "any communications or information occurring or arising on or before October 27, 1980."[2]

On April 26, 1982, a United States Magistrate granted the Commission's motion to compel answers and directed Weintraub to appear within thirty days of the date of the order to respond to the Commission's questions. The Magistrate concluded that, although Weintraub had properly asserted the privilege, that privilege was subsequently waived by Notz. On May 6, 1982, Weintraub filed an objection to the Magistrate's order. The district court upheld that order on June 9, 1982.

On June 30, 1982, the district court granted Frank and Andrew McGhee (the "McGhees") leave to intervene in the Commission's action against Weintraub. In addition to being CDCB shareholders, both McGhees are corporate officers. Frank McGhee is CDCB's President and Andrew McGhee its Vice President.[3]

[2] *See* Letter from John K. Notz, Jr., to Constantine J. Gekas, Esq. (March 11, 1982).

[3] The McGhees are alternatively described in the record as "officers" and "former officers" of CDCB. Nothing in the record indicates that the McGhees have resigned their corporate offices, nor is there any possibility that Notz, due to his appointment as trustee in bankruptcy, has succeeded to the McGhees' positions. *See* 15 A, W. Fletcher, *Private Corporations* § 7657 (Rev. Ed. 1981). Consequently, we have concluded that the McGhees are most accurately termed "officers" of CDCB.

On July 27, 1982, the district court clarified its June 9, 1982, order and ruled that "[r]espondent shall respond to specific questions at issue without asserting an attorney-client privilege on behalf of Chicago Discount Commodity Brokers, Inc." On September 21, 1982, the McGhees moved the district court for a stay of the July 27, 1982, order, pending appeal of that order. The district court denied the motion. On October 18, 1982, this Court denied an appeal from the denial of the motion for stay. In addition, on November 4, 1982, this Court denied the McGhee's motion for reconsideration of the October 18 decision.[4]

The instant appeal is from the district court's July 27, 1982, order directing Weintraub to respond to the Commission's inquiries without asserting the attorney-client privilege on behalf of CDCB.

II

Whether the trustee of a bankrupt corporation may waive the attorney-client privilege on behalf of the corporation is a question of first impression in this Court. We undertake first to set out the purposes of the attorney-client privilege, and the application of the privilege in the corporate context.

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[4] Following this Court's October 18, 1982, denial of a stay pending appeal, Commission counsel made several unsuccessful attempts to schedule Weintraub for deposition. On November 8, 1982, the Commission moved the district court for an order compelling respondent to appear on November 12, 1982, to respond to questions without asserting the attorney-client privilege. The district court denied the motion pending a ruling by this Court on intervenor's motion for reconsideration of the stay pending appeal. By Order of November 4, 1982, this Court denied the motion for reconsideration. The Commission then renewed its motion in the district court for entry of an order setting the date of respondent's deposition on November 12, 1982. The district court continued the Commission's renewed motion pending the outcome of the instant appeal.

Federal Rule of Evidence 501 governs the use of all privileges in the federal courts. The rule provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." On numerous occasions, the Supreme Court has spoken on the purpose of the attorney-client privilege. *See, e.g., Upjohn Co.* v. *United States*, 449 U.S. 383 (1981); *Trammel* v. *United States*, 445 U.S. 40 (1980); *Fischer* v. *United States*, 425 U.S. 391 (1976); *Hunt* v. *Blackburn*, 128 U.S. 464 (1888). The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice." *See Upjohn Co.* v. *United States*, 449 U.S. at 389. The privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *See Trammel* v. *United States*, 445 U.S. at 51. The privilege thus exists to promote full disclosure by the client, and to foster a relationship of trust between attorney and client. The assumption underlying the privilege is that "the benefits derived from encouraging communications outweigh the costs of keeping information from other parties." *See* Note, "Attorney-Client Privilege for Corporate Clients: The Control Group Test", 84 Harv. L. Rev. 424, 425 (1970).

That the attorney-client privilege adheres to corporations as well as to individuals is not subject to dispute. *See Radiant Burners, Inc.* v. *American Gas Ass'n.*, 320 F.2d 314, 323 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963). Of course, as an artificial entity, the corporation cannot speak for itself, but must rely on its officers and agents for exercise of the attorney-client privilege. *See Upjohn Co.* v. *United States*, 449 U.S. at 390-91.

A related question is whether the corporate attorney-client privilege exists after the corporation enters bankruptcy. A number of courts have agreed that a corporation entering bankruptcy retains the attorney-client privilege. *See In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383, 385 (2d Cir. 1982); *People's Bank* v. *Brown*, 112 F.2d 652, 654 (3d Cir.1902). However, in this case, the parties disagree as to who may waive the attorney-client privilege on behalf of the bankrupt corporation. Appellants argue that they, as officers and shareholders, have sole authority to waive. Appellee, on the other hand, contends that only the trustee in bankruptcy of the debtor corporation can waive.

On the issue as to whether a trustee in bankruptcy may waive the corporate attorney-client privilege, only two appellate decisions have come to our attention. Relied upon by appellee, they are *In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383, and *Citibank, N.A.* v. *Andros*, 666 F.2d 1192 (8th Cir. 1982). Although both of these cases held that the trustee in bankruptcy had the power to waive the attorney-client privilege on behalf of the corporation, both are distinguishable from the instant case.

In *O.P.M. Leasing*, O.P.M. Leasing Services, Inc. ("O.P.M.") was a computer leasing and financing concern that filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Reform Act, 11 U.S.C. § 101 *et seq*. Shortly after this Chapter 11 proceeding was commenced, O.P.M.'s president and vice president, who composed the entirety of the corporation's board of directors, resigned. In the course of the reorganization proceeding, the trustee in bankruptcy waived O.P.M.'s attorney-client privilege, pursuant to a request by the United States Attorney for the Southern district of New York.[5] The then former president

[5] The United States Attorney had convened a grand jury to investigate O.P.M. and its officers, and had served on the trustee a subpoena *duces tecum* requiring the production of certain O.P.M. records. The United States Attorney also requested that the trustee waive the corporation's attorney-client privilege with respect to the records.

and vice president opposed the waiver, claiming that only the former president could rightly waive the bankrupt's privilege. The bankruptcy court rejected their argument, holding that the trustee in bankruptcy succeeded to the right of the corporation to assert or waive the attorney-client privilege. The United States District Court for the Southern District of New York affirmed. On appeal, the Second Circuit also affirmed but narrowly limited its holding: "We hold that *in this situation* the power to make such a decision as is encompassed by assertion or waiver of the important attorney-client privilege adheres to the trustee by virtue of the *nonexistence of any other entity authorized to so act.*" *O.P.M. Leasing*, 670 F.2d at 387 (emphasis added.)[6]

This case does not present the same "situation" as that in *O.P.M. Leasing*. The record herein does not show that CDCB is currently without a board of directors and/or corporate officers. Nor does the record show that the McGhees have resigned their corporate offices, as their O.P.M. counterparts did. In short, the Commission has failed to demonstrate the "nonexistence of any entity authorized to waive" CDCB's attorney-client privilege.

Citibank, N.A. v. *Andros*, 666 F.2d at 1192, is closer to the present case, in that the officers of the bankrupt corporation, who had not resigned their offices, asserted the attorney-client privilege on behalf of the corporation. There are, however, a number of factual dis-

[6] The *O.P.M. Leasing* court based its decision on an analysis of the "competing interests" of the former officers and the trustee, and on an examination of New York corporation law. the court did not discuss the purposes of the attorney-client privilege, nor did the court analyze the argument that the power to waive the attorney-client privilege passes to the trustee with the property of the corporate debtor.

tinctions between *Citibank* and the instant case.[7] Apart from these distinctions, we note that in *Citibank*, the court relied heavily on an unpublished district court order from another Circuit.[8] *See* 666 F.2d at 1195, *citing In re Continental Mortgage Investors*, *slip op.* (D. Mass. July 31, 1979). After careful consideration, we do not agree with the conclusion reached in the cited slip opinion and therefore do not follow *Citibank*.

III

The Commission additionally contends that statutory law empowers the trustee in bankruptcy to waive the corporate attorney-client privilege. The trustee's authority is derived mainly from the Bankruptcy Reform Act of 1978 (the "Act"), 11 U.S.C. § 101 *et seq.* Relief under the Act is available to both individuals and corporations. *See* 11 U.S.C. § 101(30). The duties of the trustee in a Chapter 7 liquidation proceeding are extensive and primarily involve the collecting and reducing to money of the property of the debtor. *See* 11 U.S.C. § 704. Further duties are imposed upon the

[7] In *Citibank*, the corporate officers challenging the purported waiver were not, as here, shareholders in the bankrupt corportion. Moreover, the debtor corporation in *Citibank* did not have court-appointed counsel, as CDCB does here. *See In re Chicago Discount Commodity Brokers, Inc.*, No. 80 B 14472, *slip op.* (Bankr. N.D. Ill., Nov. 24, 1980). Notz did not consult counsel before waiving CDCB's privilege. In addition, it does not appear that *Citibank* involved a Chapter 7 bankruptcy proceeding, as does the instant case.

[8] In reaching its decision, the district court cited no authority and stated only that in Chapter X proceedings, the court had "no doubt that the right to make such decisions passes to the Chapter X trustees." *In re Continental Mortgage Investors*, No. 79-593-5, *slip op.* at 2. The Eighth Circuit in *Citibank* relied heavily on this case in concluding that "the right to assert or waive that privilege passes with the property of the corporate debtor to the trustee." 666 F.2d at 1195.

trustee where the corporate debtor was a commodity broker. *See* 11 U.S.C. §§ 761-766.[9]

Appellee maintains that because of these broad management powers, the trustee also possesses the authority to assert the attorney-client privilege on behalf of the corporate debtor. Essentially, appellee would have us believe that the right to assert or waive the attorney-client privilege passes with the property of the corporate debtor to the trustee. *See Citibank, N.A.* v. *Andros*, 666 F.2d at 1195. Appellee's argument is unpersuasive for several reasons.

First, although the trustee holds broad management powers for the corporate debtor, he does not replace the corporation as an entity. The corporation is capable of numerous functions even after the filing of the petition in bankruptcy. *See* 15 A, W. Fletcher, *Private Corporations* § 7657 (Rev. Ed. 1981). Nor does the trustee succeed to the positions of the officers and directors of the corporation. *Id.* In brief, the corporation exists, and will continue to exist, until formally dissolved by action of its shareholders or by the state where the firm is incorporated. *See In re Amjoe, Inc.*, 11 Collier Bankr. Cas. 45 (Bankr. M.D. Fla. 1976). The trustee may hold the power to manage the bankrupt corporation's property and assets, but he does not thereby acquire absolute power over the corporation's legal rights.

Second, to accept appellee's argument would be to condone an inequality of treatment between bankrupt corporations and bankrupt individuals with regard to the attorney-client privilege. Under the Bankruptcy Reform Act, as under prior bankruptcy laws, individual debtors are subject to public examination by the trustee. *See* 11 U.S.C. § 343. The debtor has a clear

[9] Although the Act confers broad powers on the trustee, nowhere is the trustee given specific statutory authority either to assert or waive a corporate debtor's attorney-client privilege.

right to assert privileges during this examination. *See In re Blier Cedar Co.*, 10 B.R. 993 (Bankr. D. Me. 1981). *See also 2 Collier on Bankruptcy*, ¶ 343.12 (15th ed. 1982). There is little authority to support the position that the individual debtor's attorney-client privilege passes to the trustee in bankruptcy.[10] Such a passing of the privilege could engender the absurd result of the trustee waiving the debtor's privilege as to information sought by the trustee. The attorney-client privilege would then vanish whenever the trustee, at his whim, determined that information from the debtor was necessary. By adopting appellee's contention, we would subject a debtor corporation to precisely such a risk. We perceive no reason to afford a corporate debtor less protection than that afforded an individual debtor in bankruptcy.

Third, allowing the trustee in bankruptcy to waive the attorney-client privilege of the corporate debtor discriminates against the corporate debtor solely on the basis of economic status. A solvent corporation, as long as it remains solvent, can freely assert or waive its attorney-client privilege. Once the corporation enters bankruptcy, however, it would lose to the trustee the power to control the privilege. While the trustee's interest in investigating the affairs of the corporate debtor on behalf of the creditors is certainly legitimate, it does not justify erosion of the corporation's attorney-client privilege simply on the basis of a change in economic circumstances.

Finally, and most importantly, we reject the Commission's argument because of its potential chilling effect on attorney-client communications. If the trustee in bankruptcy is permitted to waive the corporate debtor's privilege, the trust inherent in the attorney-client

[10] *See In re Smith*, 24 B.R. 3 (Bankr. S.D. Fla. 1982). This case relied upon the reasoning of *O.P.M. Leasing* and *Citibank*, which we, for the reasons stated above, decline to accept.

relationship will be jeopardized. Corporate clients will be wary of communicating fully with their attorneys for fear that sensitive information could subsequently be disclosed due to bankruptcy. Free interchange between attorney and client is the cornerstone of effective legal representation.

Therefore, we have concluded that the trustee in bankruptcy of a corporate debtor does not have the power to waive the corporation's attorney-client privilege as to any communications or information occurring or arising on or before the date the petition in bankruptcy was filed.[11]

Reversed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[11] CFTC also argues that the McGhees lack standing to challenge the trustee's waiver of CDCB's attorney-client privilege. The McGhees, as officers and shareholders of CDCB, clearly possess the requisite interest for standing.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-2420

In the Matter of
an Application to Enforce
an Administrative Subpoena of the
COMMODITY FUTURES TRADING COMMISSION,
PETITIONER-APPELLEE

v.

GARY WEINTRAUB, RESPONDENT, and
FRANK H. MCGHEE AND ANDREW MCGHEE,
INTERVENING RESPONDENTS-APPELLANTS.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
Civil Action No. 81 C 6996
Nicholas J. Bua, *Judge*

March 19, 1984

Before
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. STANLEY A. WEIGEL, *Senior District Judge* *

*Stanley A. Weigel, Senior District Judge from the United States District Court for the Northern District of California, is sitting by designation.

The court on its own motion, being duly advised, now withdraws its opinion issued in slip opinion form on November 21, 1983.

And the court now reissues its revised and amended opinion in this case, said revised opinion being in the form and words of the opinion issued November 21, 1983 with the exception of certain amendments thereto which are set forth in the attached exhibit which is incorporated herein by reference.

The Commodity Futures Trading Commission having filed its petition for rehearing with suggestion of rehearing *en banc* and the court having permitted certain amicus briefs to be filed supporting the petition for rehearing, any revisions or amendments to said petition for rehearing or amicus briefs shall be filed within fourteen days of the date of this order, and upon the failure to file any amendments or revisions, it will be assumed that the petition for rehearing and the amicus briefs are redirected to the opinion of this court as presently revised. A response to the suggestion for rehearing *en banc* having been called for heretofore, the intervenor-appellees shall have ten days in which to respond to any revisions or amendments to the petition for rehearing or amicus briefs.

IT IS SO ORDERED.

EXHIBIT

References herein are to the slip opinion of this court's opinion issued November 21, 1983.

Delete the sentences concluding the paragraph and substitute:

> Frank McGhee is president of CDCB, and until October 21, 1980, Andrew McGhee was an officer and director of the corporation.

Pp. 3-4, footnote 3:

Replace the footnote with the following:

> [3] A supplement to the record filed by the Commission in conjunction with its motion for rehearing shows that Andrew McGhee resigned his positions as officer and director of CDCB on October 21, 1980. Larry Cote, the corporate secretary and vice president, resigned the following day. After October 22, Frank McGhee was the sole director and officer of CDCB. Nothing in the record indicates that Frank McGhee resigned these positions. Nor did Notz, through his appointment as receiver or as trustee in bankruptcy, succeed to Frank McGhee's positions. *See* 15A W. Fletcher, *Private Corporations* §§ 7396, 7657 (Rev. Ed. 1981). Consequently, we conclude that Frank McGhee remains an "officer" and "director" of CDCB.

Pp. 6, mid-page to roman III, p. 8:

Replace this material with the following:

> In both of these cases, the court upheld the trustee's power to waive the attorney-client privilege on behalf of the corporation.
>
> In *O.P.M. Leasing*, O.P.M. Leasing Services, Inc. ("O.P.M.") was a computer leasing and financing concern that filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Reform Act, 11 U.S.C. §§ 101 *et seq*. Shortly after this Chapter 11 proceeding was commenced, O.P.M.'s president and vice president, who composed the entirety of the corporation's board of directors, resigned. In the course of the reorganization proceeding, the trustee in bankruptcy waived

> O.P.M.'s attorney-client privilege, pursuant to a request by the United States Attorney for the Southern District of New York.[5] The then former president and vice president opposed the waiver, claiming that only the former president could rightly waive the bankrupt's privilege. The bankruptcy court rejected this argument, holding that the trustee in bankruptcy succeeded to the right of the corporation to assert or waive the attorney-client privilege. The United States District Court for the Southern District of New York affirmed.
>
> On appeal, the Second Circuit also affirmed. Its conclusion, however, was expressly premised upon "the crucial fact . . . that there has been no board of directors of OPM in existence during the tenure of the trustee. *O.P.M. Leasing*, 670 F.2d at 386. The court's holding was thus narrowly limited: "We hold that *in this situation* the power to make such a decision as is encompassed by assertion or waiver of the important attorney-client privilege adheres to the trustee by virtue of the *nonexistence of any other entity authorized to so act.*" *Id.* at 387 (emphasis added).[6]
>
> This case is different from *O.P.M. Leasing* because Frank McGhee remains an officer and director of CDCB, the debtor corporation. Thus, the record does not show the "nonexistence of any other entity" authorized to waive CDCB's attorney-client privilege. Nor does the record show that Frank McGhee waived or relinquished control of the corporate attorney-client privilege when he consented to the transfer of corporate assets to Notz as receiver.[7]
>
> The facts in *Citibank, N.A.* v. *Andros* are close to those in the present case, in that the officers of the bankrupt corporation, who had not resigned their offices, asserted the attorney-client privilege on behalf of the corporation. The Eighth Circuit reversed the district court's ruling that the trustee

could not waive the privilege on behalf of the corporation. 666 F.2d at 1193. In reaching this conclusion, the court reasoned that the right to assert or waive the attorney-client privilege passes with the property of the corporate debtor to the trustee. *Id.* at 1195. No authority was cited to support this interpretation except an unpublished district court order from another circuit. *See id.* (citing *In re Continental Mortgage Investors*, No. 79-593-S, slip op. at 2 (D. Mass. July 31, 1979)). The court did not address the policy in favor of encouraging full disclosure that lies beneath the attorney-client privilege. Nor did it explain why communications between a corporation and its attorney should be treated differently in bankruptcy than communications between an individual and his attorney. After careful consideration, we do not agree with the conclusion reached in *Citibank* and the cited slip opinion that the corporate right to assert or waive the attorney-client privilege is a form of property that passes to a the trustee upon bankruptcy. *Cf. O.P.M. Leasing*, 670 F.2d at 386 n.2 (declining to assess the merit of the *Citibank* reasoning). We therefore do not follow those decisions.

P. 8, footnote 7:

Replace the existing footnote with the following:

[7] In its petition for rehearing, the Commission suggests that all authority to exercise the attorney-client privilege passed from McGhee to Notz by virtue of the October 27, 1980 consent decree. Part III of the Order of Preliminary Injunction and Other Relief filed as a part of the decree recites in detail the transfer of assets and powers from the corporate officers and directors to Notz as receiver. This highly specific list contains no mention of a release to the receiver of power to claim or waive the attorney-client privilege. We therefore conclude that McGhee as corporate president did not relinquish control of the attorney-client privilege when CDCB entered receivership.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Cause No. 81 C 6996

COMMODITY FUTURES TRADING COMMISSION

v.

GARY WEINTRAUB

Presiding Judge: Honorable Nicholas J. Bua

Dated: July 27, 1982

The court clarifies its order of June 9, 1982 to provide that Respondent shall respond to the specific questions at issue without asserting an attorney-client privilege on behalf of Chicago Discount Commodity Brokers, Inc.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Cause No. 81 C 6996

COMMODITY FUTURES TRADING COMMISSION

v.

GARY WEINTRAUB

Presiding Judge: Honorable Nicholas J. Bua

Dated: June 9, 1982

Ordered that respondent, GARY WEINTRAUB, appear before representatives of the Commodity Futures Trading Commission and fully respond to the questions which are the subject of the Commission's Application without asserting an attorney-client privilege.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 81-C-6996

In the Matter of
An Application to Enforce
an Administrative Subpoena of the

COMMODITY FUTURES TRADING COMMISSION,
APPLICANT,

v.

GARY A. WEINTRAUB, RESPONDENT.

ORDER

This matter coming to be heard on the COMMODITY FUTURES TRADING COMMISSION's ("CTFC") Application for an Order to Show Cause and Order to Compel Answers to Questions posed to GARY A. WEINTRAUB ("WEINTRAUB"),

The Court being fully advised in the premises and oral argument having been completed on this matter,

The Court finds and concludes that, during his investigative testimony on August 26, 1981, the Respondent WEINTRAUB properly asserted the attorney/client privilege of the now defunct firm of Chicago Discount Commodity Brokers, Inc. ("CDCB") to the questions of the CFTC, as set forth in the CFTC's Application,

The Court further finds, however, that on March 11, 1982, the Interim Bankruptcy Trustee of CDCB, John K. Notz, Jr., successor in interest of all assets, rights and privileges of CDCB, including the attorney/client

privilege at issue herein, waived that privilege of the firm for all communications or information (with an exception not pertinent herein) occurring or arising on or before October 27, 1980.

IT IS THEREFORE HEREBY ORDERED that the Respondent, WEINTRAUB, appear before representatives of the CFTC in Chicago, Illinois at a time and place mutually convenient to the parties, but no later than thirty days from the date of this Order, and respond to the various questions which are the subject of the CFTC's Application without asserting an attorney/client privilege.

DATED: April 26, 1982

ENTER: _____
Carl B. Sussman
U.S. Magistrate

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82-2420

In the Matter of
an Application to Enforce
an Administrative Subpoena of the
COMMODITY FUTURES TRADING COMMISSION,
PETITIONER-APPELLEE,

v.

GARY WEINTRAUB, RESPONDENT, and
FRANK H. MCGHEE AND ANDREW MCGHEE,
INTERVENING RESPONDENTS-APPELLANTS.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
Civil Action No. 81 C 6996
Nicholas J. Bua, *Judge*

April 18, 1984

Before
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. STANLEY A. WEIGEL, *Senior District Judge**

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*Stanley A. Weigel, Senior District Judge from the United States District Court for the Northern District of California, is sitting by designation.

On consideration of the amended petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by the Commodity Futures Trading Commisssion, petitioner-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82-2420

COMMODITY FUTURES TRADING COMMISSION,
PETITIONER-APPELLEE,

v.

GARY WEINTRAUB, RESPONDENT, and
FRANK H. MCGHEE AND ANDREW MCGHEE,
INTERVENING RESPONDENTS-APPELLANTS.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 81-C-6996—**Nicholas J. Bua,** *Judge* and
Carl B. Sussman, United States *Magistrate*

November 21, 1983

Before
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. STANLEY A. WEIGEL, *Senior District Judge**

JUDGMENT—ORAL ARGUMENT

Opinion by Judge Weigel

***The Honorable Stanley A. Weigel, Senior District Judge for the United States District Court for the Northern District of California, is sitting by designation.**

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX H

The Bankruptcy Reform Act of 1978 (11 U.S.C. 101 *et seq.*) provides in pertinent part:

§ 323. **Role and capacity of trustee**

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has capacity to sue and be sued.

§ 343. **Examination of the debtor**

The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title. Creditors, any indenture trustee, or any trustee or examine in the case may examiner[1] the debtor.

§ 521. **Debtor's duties**

The debtor shall—

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, and a statement of the debtor's financial affairs;

(2) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(3) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate; and

(4) appear at the hearing required under section 524(d) of this title.

§ 541. **Property of the estate**

(a) The commencement of a case under section 301, 302, or 303 of this title creates an es-

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[1] So in original. Probably should be "examine."

tate. Such estate is comprised of all the following property, whereever located:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) An interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earnings from services per-

formed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

* * * * *

§ 701. **Interim trustee**

(a) Promptly after the order for relief under this chapter, the court shall appoint one disinterested person that is a member of the panel of private trustees established under section 604(f) of title 28 or that was serving as trustee in the case immediately before the order for relief under this chapter to serve as interim trustee in the case.

(b) The service of an interim trustee under this section terminates when a trustee elected or designated under section 702 of this title to serve as trustee in the case qualifies under section 322 of this title.

(c) An interim trustee serving under this section is a trustee in a case under this title.

§ 702. **Election of trustee**

(a) A creditor may vote for a candidate for trustee only if such creditor—

(1) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution under section 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i) of this title;

(2) does not have an interest materially adverse, other than an equity interest that is not substantial in relation to such creditor's interest as creditor, to the interest of creditors entitled to such distribution; and

(3) is not an insider.

(b) At the meeting of creditors under section 341 of this title, creditors may elect one person

to serve as trustee in the case if election of a trustee is requested by creditors that may vote under subsection (a) of this section, and that hold at least 20 percent in amount of the claims specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section.

(c) A candidate for trustee is elected trustee if—

(1) creditors holding at least 20 percent in amount of the claims specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section vote; and

(2) such candidate receives the votes of creditors holding a majority in amount of claims specified in subsection (a)(1) of this section that are held by creditors that vote for trustee.

(d) If a trustee is not elected under subsection (c) of this section, then the interim trustee shall serve as trustee in the case.

§ 704. Duties of trustee

The trustee shall—

(1) collect and reduce to money the property of the estate for which such trustee serves, and close up such estate as expeditiously as is compatible with the best interests of parties in interests;

(2) be accountable for all property received;

(3) investigate the financial affairs of the debtor;

(4) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(5) if advisable, oppose the discharge of the debtor;

(6) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(7) if the business of the debtor is authorized to be operated, file with the court and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the court requires; and

(8) make a final report and file a final account of the administration of the estate with the court.

§ 721. Authorization to operate business

The court may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.

SUBCHAPTER IV—COMMODITY BROKER LIQUIDIATION

§ 761. Definitions for this subchapter

In this subchapter—

(1) "Act" means Commodity Exchange Act (7 U.S.C. 1 et seq.);

(2) "clearing organization" means organization that clears commodity contracts made on, or subject to the rules of, a contract market or board of trade;

(3) "Commission" means Commodity Futures Trading Commission;

(4) "commodity contract" means—

(A) with respect to a futures commission merchant, contract for the purchase or sale of a commodity for future delivery on, or

subject to the rules of, a contract market or board of trade;

(B) with respect to a foreign futures commission merchant, foreign future;

(C) with respect to a leverage transaction merchant, leverage transaction;

(D) with respect to a clearing organization, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

(E) with respect to a commodity options dealer, commodity option;

(5) "commodity option" means agreement or transaction subject to regulation under section 4c(b) of the Act (7 U.S.C. 6c(b));

(6) "commodity options dealer" means person that extends credit to, or that accepts cash, a security, or other property from, a customer of such person for the purchase or sale of an interest in a commodity option;

(7) "contract market" means board of trade designated as a contract market by the Commission under the Act:

(8) "contract of sale", "commodity", "future delivery", "board of trade", and "futures commission merchant" have the meanings assigned to those terms in the Act;

(9) "customer" means—

(A) with respect to a futures commission merchant—

(i) entity for or with whom such futures commission merchant deals and that holds a claim against such futures commission merchant on account of a commodity contract made, received, acquired, or held by or

through such futures commission merchant in the ordinary course of such futures commission merchant's business as a futures commission merchant from or for the commodity futures account of such entity; or

(ii) entity that holds a claim against such futures commission merchant arising out of—

(I) the making, liquidation or change in the value of a commodity contract of a kind specified in clause (i) of this subparagraph;

(II) a deposit or payment of cash, a security, or other property with such futures commission merchant for the purpose of making or margining such a commodity contract; or

(III) the making or taking of delivery on such a commodity contract;

* * * * *

§ 762. Notice to the Commission and right to be heard

(a) The clerk shall give the notice required by section 342 of this title to the Commission.

(b) The Commission may raise and may appear and be heard on any issue in a case under this chapter.

§ 763. Treatment of accounts

(a) Accounts held by a particular customer in separate capacities shall be deemed to be accounts of separate customers.

(b) A member of a clearing organization shall be deemed to hold such member's proprietary account in a separate capacity from such member's customers' account.

(c) The net equity in a customer's account may not be offset against the net equity in the account of any other customer.

§ 764. Voidable transfers

(a) Except as otherwise provided in this section, any transfer of property that, but for such transfer, would have been customer property, may be avoided by the trustee, and such property shall be treated as customer property, if and to the extent that the trustee avoids such transfer under section 544, 545, 547, 548, 549, or 724(a) of this title. For the purpose of such sections, the property so transferred shall be deemed to have been property of the debtor, and, if such transfer was made to a customer or for a customer's benefit, such customer shall be deemed, for the purposes of this section, to have been a creditor.

(b) Notwithstanding sections 544, 545, 547, 548, 549 and 724(a) of this title, the trustee may not avoid a transfer made before five days after the order for relief, if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is—

(1) a transfer of a commodity contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, securities, or other property margining or securing such commodity contract; or

(2) the liquidation of a commodity contract entered into or carried by or through the debtor on behalf of a customer.

§ 765. Customer instruction

(a) The notice under section 342 of this title to customers shall instruct each customer—

(1) to file a proof of such customer's claim promptly, and to specify in such claim any specifically identifiable security, property, or commodity contract; and

(2) to instruct the trustee of such customer's desired disposition, including transfer under section 766 of this title or liquidation, of any commodity contract specifically identified to such customer.

(b) The trustee shall comply, to the extent practicable, with any instructions received from a customer regarding such customer's desired disposition of any commodity contract specifically identified to such customer. If the trustee has transferred, under section 766 of this title, such a commodity contract, the trustee shall transmit any such instruction to the commodity broker to whom such commodity contract was so transferred.

§ 766. Treatment of customer property

(a) The trustee shall answer all margin calls with respect to a specifically identifiable commodity contract of a customer until such time as the trustee returns or transfers such commodity contract, but the trustee may not make a margin payment that has the effect of a distribution to such customer of more than that to which such customer is entitled under subsection (h) or (i) of this section.

(b) The trustee shall prevent any open commodity contract from remaining open after the last day of trading in such commodity contract, or into the first day on which notice of intent to deliver on such commodity contract may be tendered, whichever occurs first. With respect to any commodity contract that has remained open after the last day of trading in such commodity contract or with respect to which delivery must be made or accepted under the rules of the contract market on which such commodity contract was made, the trustee may operate the business of the debtor for the purpose of—

(1) accepting or making tender notice of intent to deliver the physical commodity underlying such commodity contract;

(2) facilitating delivery of such commodity; or

(3) disposing of such commodity if a party to such commodity contract defaults.

* * * * *

§ 1104. **Appointment of trustee or examiner**

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

(b) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by

current or former management of the debtor, if—

(1) such appointment is in the interests of creditors, and equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

(c) If the court orders the appointment of a trustee or an examiner, if a trustee or an examiner dies or resigns during the case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the court shall appoint one disinterested person to serve as trustee or examiner, as the case may be, in the case.

§ 1107. **Rights, powers, and duties of debtor in possession**

(a) Subject to any limitations on a trustee under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

§ 1108. **Authorization to operate business**

Unless the court orders otherwise, the trustee may operate the debtor's business.

§ 15701. Interim trustee

(a) Promptly after the order for relief under chapter 7 of this title, the United States trustee shall appoint one disinterested person that is a member of the panel of private trustee[1] established under section 568(a)(1) of title 28 or that was serving as trustee in the case immediately before the order for relief under this chapter to serve as interim trustee in the case.

(b) If none of such persons is willing to serve as interim trustee in the case, then the United States trustee shall serve as interim trustee in the case.